SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DE FUNIS, *et al.*,

Appellants,

v.

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, *et al.*,

Appellees.

BRIEF OF ADVOCATE SOCIETY, AMERICAN JEWISH COMMITTEE, JOINT CIVIC COMMITTEE OF ITALIAN AMERICANS AND UNICO NATIONAL AS *AMICI CURIAE*

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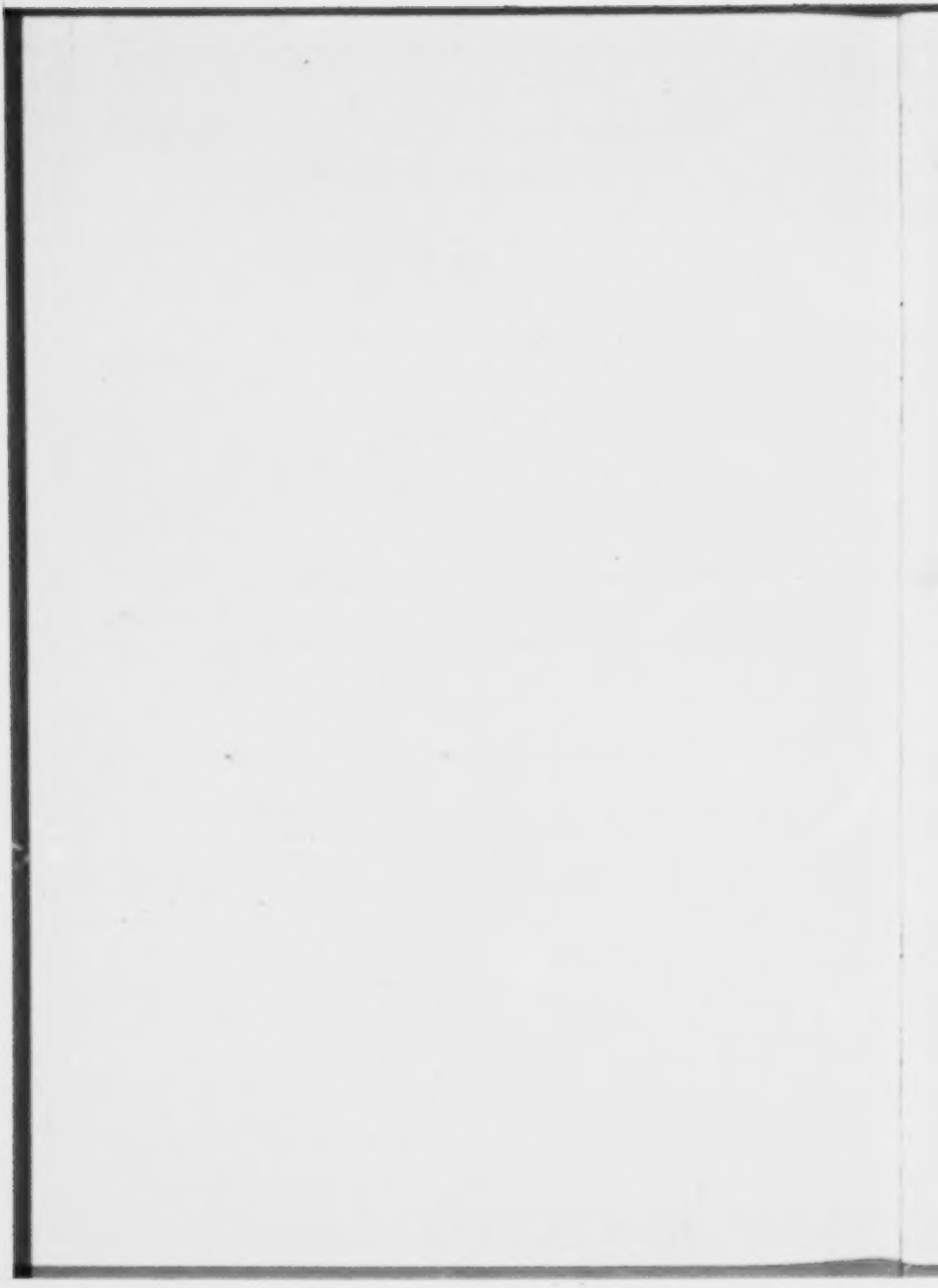

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Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2000e-15) 16

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Cahn, THE SENSE OF INJUSTICE, p. 15 (New York University Press, 1949) 20

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Coleman, "Preferential Policy Could Backfire," Cleveland Sun-Press, November 15, 1973 22
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Sowell, BLACK EDUCATION—MYTHS AND TRAGEDIES, pp. 123, 292 (David McKay, 1972) 22, 24
St. Paul Dispatch, May 10, 1972 19
Summers, "Preferential Admission: An Unreal Solution to a Real Problem," 2-3 TOLEDO LAW REVIEW, 377-379 (1970) 18
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Interest of the *Amici*

This brief is submitted with the consent of counsel for the parties on behalf of the following organizations:

Advocate Society
American Jewish Committee
Joint Civic Committee of Italian Americans
UNICO National

The Advocate Society is composed of 300 Polish-American lawyers from the greater Chicago area, and is the largest group of Polish-American lawyers in the United States. Its goals are to promote the welfare of its members and establish proper relationships with the public, promote progress of the law and the administration of justice, and maintain the honor and dignity of the legal profession.

The American Jewish Committee is a national organization of approximately 40,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It has always been the conviction of this organization that the security and the constitutional rights of American Jews can best be protected by helping to preserve the security and the constitutional rights of all Americans, irrespective of race, creed or national origin. For this reason the American Jewish Committee has vigorously supported the extension of equal educational opportunity to all individuals. Consequently it has filed briefs as *amicus curiae* in support of this concept in numerous cases before this Court, including *Brown* v. *Board of Education,* 347 U.S. 483 (1954), *Keyes* v. *School District No. 1,* 37 L Ed 2d 548 (1973) and, most recently, *Lau* v. *Nichols,* 472 F. 2d 909 (9th Cir. 1973).

The Joint Civic Committee of Italian Americans is an "umbrella" organization bringing together the varied social, fraternal, benevolent and service organizations of Italian-Americans within the greater metropolitan Chicago area. It was founded 20 years ago to coordinate the various activities of the many groups that subscribe to its goal of eliminating bias and discrimination against Italian-Americans.

UNICO National is a service organization of Italian-Americans with chapters throughout the United States. UNICO National represents approximately 50,000 people and has as its objectives to foster, encourage and promote the Italian heritage and culture as a creative force for the good of all America and to enhance the interest of each member in the public welfare of his community. UNICO National is 50 years old and has been active in the areas of scholarship, aid to the physically handicapped and the fostering of research in the afflictions of mental health.

Opinion Below

The opinion of the Supreme Court of Washington is reported in 82 Wn. 2d 11, 507 P. 2d 1169.

Statement of the Case

Marco De Funis applied for admission to the Law School of the University of Washington in the class which was to commence in September of 1971. He was one of 1,601 applicants who were competing for approximately 150 openings in that class.

Persons seeking admission must have earned an undergraduate degree and have taken the Law School Admission Test (LSAT) administered by the Educational Testing Service of Princeton, N.J. To rank the applicants, a formula had been devised, based on past experience at the law school, that combined undergraduate grade point average with LSAT score to produce a number called Predicted First-Year Average (PFYA), which has been validated as an accurate gauge of law school performance.

Although an applicant's PFYA clearly was a major factor in the Admission Committee's process of selection (along with such personal qualities as background, apparent motivation and experience) and those below a PFYA score of 74.5 almost always were rejected, all applicants from certain minority groups (black, Chicano, American Indian, Philippine American) received special consideration, irrespective of their PFYA.

Applicants who achieved a PFYA of 77 or better generally were accepted almost automatically. Those non-

minority applicants who scored between 76.99 and 74.5 were evaluated separately from minority applicants in the identical scoring range, as well as from minority applicants who scored below 74.5. De Funis, a non-minority applicant and a Phi Beta Kappa, *magna cum laude* graduate of the University, scored 76.23. He was denied admission.

De Funis filed suit in the Superior Court of Washington in which he charged that he was wrongfully denied admission because other applicants whose PFYA was lower than his own were accepted nevertheless because of their race. After a trial, the Superior Court held that the University had in fact discriminated against De Funis on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment and ordered the University to enroll him. The court found that 44 applicants from the stipulated minority categories had been offered admission to the Law School, the great majority of whom had a lower PFYA than De Funis and some of whom, had they been white, would have been summarily rejected.

While the University enrolled De Funis in compliance with the Superior Court order, it appealed the trial court decision to the Supreme Court of Washington. On March 8, 1973, that court in a 6-2 decision reversed the Superior Court ruling and upheld the right of the University to consider race as a factor in selecting students for its Law School. On June 5, 1973, enforcement of the judgment of the Supreme Court of Washington was stayed by Mr. Justice Douglas pending the disposition of an appeal or petition for a writ of certiorari in this Court. On November 19, 1973, this Court agreed to review the case.

The Question Presented

Whether the Equal Protection Clause of the Fourteenth Amendment is violated by the action of a state university law school in granting preferential admission to applicants from certain groups on the basis of race.

Constitutional Provision

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Summary of Argument

I. There has been a vast array of cases in which this Court has struck down state action supporting racial discrimination as violative of the Equal Protection Clause of the Fourteenth Amendment. Among these are decisions which have imposed "a heavy burden of justification" on state establishment of classifications based on race. Where racial classifications have been either sustained, permitted to stand or mandated on the ground of "compelling state interest," such classifications ordinarily had been designed to remedy proven preexistent racial discrimination, as well as to accomplish this objective without discriminating invidiously against others.

The right to equal protection has been declared to be protective of individuals of every race, rather than of

groups of any race. Moreover, it is not the intent of the state's action in this area which is controlling, but rather its effect.

A racial quota is no less a quota merely because it is not identified as such. Quotas based on race are inherently discriminatory and, accordingly, have been proscribed as unlawful by this Court. The Court has also construed the enactment of the Civil Rights Act of 1964 to reflect the intent of Congress to bar "discriminatory preference for any group, minority or majority, * * *." For these reasons, racially preferential admission to a state educational institution violates the Equal Protection Clause.

II. Although preferential admission to professional schools on the basis of race has been prevalent, and the reasons for it we understand, it is nonetheless an unwise practice. Necessarily it penalizes innocent individuals. Neither is it equitable in favoring on the basis of race some of those who are disadvantaged over others who may be equally or even more disadvantaged.

Since disadvantaged minority persons need the best possible legal representation, they are ill-served by a system of law school admissions which is conducive to a lowering of legal professional standards. Preferential admission may well engender preferential grading too, with concomitant resentment by those who are not among its beneficiaries. Further, those disadvantaged minority students who succeed strictly on merit nevertheless may be stigmatized unjustly as beneficiaries of a double standard. The disproportionately high rates of failure on bar examinations by black students who have succeeded in obtaining

law degrees may be symptomatic of preferential grading in law schools based on race.

A number of black spokesmen have decried the erosion of standards implicit in racially based preferential treatment as being, in the long run, detrimental to the best interests of the black community.

III. Eradicating racial discrimination, in and of itself, will not suffice to overcome the consequences of the acute deprivations which have been imposed for so long on people of color in America. There is an urgent need for legitimate affirmative action programs to increase minority enrollment in professional schools, but which do not simultaneously violate the Constitution or create discrimination in reverse.

Disadvantaged minority students with professional career potentialities must be identified at the high school and junior high school levels and rendered all possible assistance to enable them to fulfill their potentialities. Further assistance is necessary on the college level, through measures such as open enrollment in public colleges, financial aid and special remedial education programs.

In approaching the professional school level, a success model has been provided by the Council on Legal Education Opportunity (CLEO) pre-admission summer institutes. CLEO has provided the necessary orientation, remediation and financial stipends to enable hundreds of disadvantaged minority students to become practicing lawyers. It deserves to be replicated extensively. Similar special remedial pre-admission programs should be undertaken by professional schools themselves.

I

Preferential admission to a state educational institution on the basis of race contravenes the Equal Protection Clause of the Fourteenth Amendment.

A. The Burden of Racial Classifications and Individual Rights

Discrimination because of race by any state agency is in violation of the Equal Protection Clause of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970); *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). Further, this Court has held consistently that any classifications by a state based upon race, whether in whole or in part, are inherently suspect. In *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), which dealt with a cohabitation statute which imposed a greater penalty when the participants were members of different races, the Court said:

> But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect." *Bolling* v. *Sharpe*, 347 US 497, 499, 98 L ed 884, 886, 74 S Ct 693, and subject to the "most rigid scrutiny," *Korematsu* v. *United States*, 323 US 214, 216, 89 L ed 194, 198, 65 S Ct 193; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Hirabayashi* v. *United States*, 320 US 81, 100, 87 L ed

1774, 1786, 63 S Ct 1375. Thus it is that racial classifications have been held invalid in a variety of contexts. See, e.g., *Virginia Board of Elections* v. *Hamm*, 379 US 19, 13 L ed 2d 91, 85 S Ct 157 (designation of race in voting and property records); *Anderson* v. *Martin*, 375 US 399, 11 L ed 2d 430, 84 S Ct 454 (designation of race on nomination papers and ballots); *Watson* v. *City of Memphis*, 373 US 526, 10 L ed 2d 529, 83 S Ct 1314 (segregation in public parks and playgrounds); *Brown* v. *Board of Education*, 349 US 294, 99 L ed 1083, 75 S Ct 753 (segregation in public schools). (at 191-192)

In invalidating the statute there in question, the Court in *McLaughlin* added that an enactment based on a racial classification, "• • • even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy" (at 196). Accord, *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Frontiero* v. *Richardson*, 36 L ed 2d 583 (1973).

While historically the impetus for the adoption of the Fourteenth Amendment was the determination to bring to Negroes full rights of citizenship, there can be no dispute that it applies with equal force to discrimination by a state against members of any racial or ethnic group. *Oyama* v. *California*, 332 U.S. 633 (1948); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). Hence the Equal Protection Clause perforce applies to discrimination against persons because they are not black or because they are white.

It is well settled also that the right to equal protection granted by the Fourteenth Amendment is an individual

and personal one, not a group right. For example, in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), the Court said:

> The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the Court may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. (at 22)

Other decisions of this Court which have stressed the personal nature of the rights guaranteed by the Equal Protection Clause are *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, 642 (1950); and *McCabe* v. *Atchison, Topeka & Santa Fe Railway*, 235 U.S. 151, 161 (1914).

If a given racial group had the constitutional right to membership as a group in the student body of a state institution, then it might be contended that individuals of a different racial background would have to be refused to enable that group to achieve proportional representation in such student body, artificially imposed in that very manner. Although group interests of different racial groups in this country may well be legitimate, it follows from the decisions cited above that there is no such thing as a group right under the Fourteenth Amendment. That Amendment guarantees rights to the individual and to the individual only. If an individual is denied admission to a state institution even though he is better qualified than others who have been accepted, and if the denial is due to the fact that

he is or is not a member of a particular racial or ethnic group, his personal and individual right to be free from discrimination has been infringed. The fact that members of other groups may have suffered discrimination in the past is no justification for present discrimination against him.

In the instant case, the appellant De Funis has been deprived of his constitutional right to be considered for admission to the Law School as an individual applicant, and without regard to his race. Had De Funis been black, Chicano, American Indian or Philippine American, under the two-track admission system established by the Law School, plainly he would have been admitted. Yet there was no judicial finding whatever in the court below of past discrimination by the Law School against any of the above named groups which, it is conceded, were marked for preferential consideration in the competition for admission.

Nor does it matter one iota that there was no intent on the part of the Law School to discriminate against the petitioner on the basis of race. It is the effect that matters. "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." *Burton* v. *Wilmington Parking Authority, supra,* at 725. See also *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 432 (1971).

The Supreme Court of Washington has found "the state interest in eliminating racial imbalance within public legal education to be compelling." 507 P. 2d at 182. It found also that "the educational interest of the state in producing a racially balanced student body at the law school is compelling," and that "the shortage of minority attorneys—

and, consequently, minority prosecutors, judges and public officials—constitutes an undeniably compelling state interest." 507 P. 2d at 1184. This, in essence, is the rationale for the decision below which upholds this particular classification based on race.

In other cases heretofore, which are still in good standing,[1] where this Court has either upheld, let stand or mandated a classification based on race, there has been a prerequisite, i.e., a finding of prior discrimination based on race, which the classification was expressly designed to remedy. Moreover, the remedy in such cases did not clearly deprive others of any rights guaranteed them by the Constitution, as it does in the instant case. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969); *Porcelli* v. *Titus*, 431 F. 2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (3d Cir.), *cert. denied*, 404 U.S. 584 (1971); *Carter* v. *Gallagher*, 452 F. 2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

For example, *Carter, supra*, which is cited in the decision below, is readily distinguishable from the instant case. There the preference granted, based on a specific finding of racial discrimination by the Minneapolis Fire Department (which had never hired a single black), was expressly made a temporary one limited to the hiring of 20 minority

1. The Japanese relocation cases, in which the Court sustained a racial classification by finding that national security constituted a compelling state interest, can scarcely be relied upon to buttress the decision below. *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943).

persons. Subsequently, the job selection procedure was to be non-preferential and non-discriminatory. In the instant case, no such limits have been imposed and, more importantly, minority persons had not been excluded from the Law School. Further, in *Carter* the court found no evidence that the qualification test for appointment to the fire department had been validated as an accurate gauge of the examinees' ability to do the job. Thus, even absent the test, there was no proof that less qualified minority applicants would be hired in place of better qualified whites. In the instant case, it is acknowledged that better qualified whites have in fact been rejected in favor of less qualified applicants from the stipulated minority groups.

In one sense, the instant case is one of first impression. From a different perspective, however, its problem has been encountered before, albeit in reverse in terms of race. Whereas in *Sweatt* v. *Painter, supra,* the Court ordered the black plaintiff admitted to the University of Texas School of Law not because of unconstitutional discrimination but because the defendant failed to prove the availability to the plaintiff of separate but equal facilities,[2] in *Florida ex rel. Hawkins* v. *Board of Control,* 350 U.S. 413 (1956), the Court in a *per curiam* decision ordered the black plaintiff, who was denied admission solely because of race, admitted to the University of Florida School of Law "under the rules and regulations applicable to other qualified applicants" (at 414), even though a black law school was then available to him at Florida A. & M. University. This, we believe, is the law today and, indeed, should be the law.

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2. 339 U.S. 629, 633 (1950).

B. Quotas and Reverse Discrimination

The Law School's plan to bring about a "reasonable representation" of students from the stipulated minority groups has not been called a quota. Since "quota" is a painful word to many people because it is reminiscent of past injustices, it is often disguised by a euphemism such as "ratio" or "reasonable representation." Many a *de facto* quota today is characterized as something else.[3] While it is true that in the instant case there was no fixed number or percentage of the specified minority group students to be admitted, the element of flexibility does not negate the fact of a sought-after rough proportionality (which appears to be considerably higher than their proportions in the area population at large). Whether fixed or rough, and however labeled, floor quotas for certain groups inevitably must signify ceiling quotas for other groups. The resulting injustice is palpable. It need not be elaborated.

The attitude of this Court toward the quota concept was reflected in its unanimous decision, with Mr. Justice Douglas not taking part, in *Hughes* v. *Superior Court of California*, 339 U.S. 460 (1950). In that case, which presented the question whether the Supreme Court of California had the right to enjoin a union from picketing which was conducted for the purpose of forcing a quota system upon an employer, this Court noted in its opinion, delivered by Mr. Justice

3. See, e.g., Raab, *Quotas by Any Other Name*, Commentary, January 1972.

"One of the marks of a free society is emphasis on achieved status over ascribed status, the ascendancy of performance over ancestry. * * * Achieved status is that aspect of democracy which represents the primacy of the individual, and of individual freedom." *Group Life in America, A Task Force Report*, The American Jewish Committee (1972), pp. 85-86.

Frankfurter, that the California court had held "that the conceded purpose of the picketing in this case—to compel the hiring of Negroes in proportion to Negro customers—was unlawful even though pursued in a peaceful manner." (at 462). The Court also quoted from the California decision that part explaining why a quota system is discriminatory, i.e. that those seeking to set up a quota system "would, to the extent of the fixed proportion, make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but rather, on membership in a particular race." (at 463-464). The Court went on to say:

> To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities. (at 464)

In affirming the California Supreme Court decision granting the injunction against the picketing, this Court held, in effect, that the picketing was unlawful because its purpose, to establish a quota based on race, was unlawful. In Fourteenth Amendment terms, any state action in support of a racial quota system inevitably clashes with the Equal Protection Clause.

C. Congressional Intent and Discriminatory Preference

In construing Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000e-2000e-15) in *Griggs* v. *Duke Power Co., supra,* which held that job qualification standards must be performance related, this Court said unanimously, with Mr. Justice Brennan not participating:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. (at 430, 431)

Although *Griggs,* of course, dealt with job discrimination rather than educational discrimination, the philosophy which undergirds it cannot be reconciled with the decision below in the instant case. In enacting Section 703(j) of Title VII (42 U.S.C. §2000e-2(j), Congress abjured preferential treatment as a remedy for racial imbalance in employment. If preferential treatment based on race is deemed to be an improper remedy for an employment situation involving a proven history of racial discrimination, as in *Griggs, a fortiori* it is an improper remedy for an educational situation, closely related to employment opportunity, where there is no proof of such a history. *Griggs,* therefore, is highly apposite to *DeFunis.*

In his dissenting opinion in the instant case, Chief Justice Hale of the Supreme Court of Washington cited with approval the employment discrimination ruling in *Anderson* v. *San Francisco Unified School District,* 357 F.Supp. 248 (N.D. Cal. 1972), in which the court rejected a racially preferential scheme for promotion of public school administrators. In so doing, the court observed:

> Preferential treatment under the guise of "affirmative action" is the imposition of one form of racial discrimination in place of another. The questions that must be asked in this regard are: must an individual sacrifice his right to be judged on his own merit by accepting discrimination based solely on the color of his skin? How can we achieve the goal of equal opportunity for all if, in the process, we deny equal opportunity to some? (at 249)

The decision in *Anderson, supra,* was grounded in part on Title VI, Section 601, of the Civil Rights Act of 1964 (42 U.S.C. §2000d) in which Congress, of course, made clear its intent to bar discrimination against any person on the basis of race "under any program or activity receiving Federal financial assistance."

II

Preferential admission to a professional school on the basis of race is unsound social policy.

There appears to be little question but that in recent years preferential admission to professional schools of certain disadvantaged minority group applicants has been a reality. With regard to law schools, in the spring of 1970 an entire issue of the University of Toledo Law Review

addressed the subject of "Disadvantaged Students and Legal Education—Programs for Affirmative Action." Among the authors of the various articles in this survey, who expressed divergent opinions on the subject, there was broad consensus, however, that preferential admission to law schools was a fact of life. As noted by one professor, who is basically sympathetic to such admission practices:

> First, there is now ample evidence that institutions of higher learning, and law schools in particular, do give such special consideration to applications from minority group members. Students specially admitted because of race or ethnic status in a sense "displace" white or Anglo students with objectively more impressive paper records and higher standardized test scores. Moreover, minority students are almost certain to need a level of financial assistance that has rarely been given to the most promising non-minority students—with the result that monetary needs of many students who would formerly have received generous scholarships will now go unmet.[4]

Quite apart from the critical issue of constitutionality, and it should be noted that the instant case is a prime example of how social policy factors may influence ideas about constitutionality, there are a number of reasons why racially discriminatory classifications in professional school admission practices are unsound.[5] The most important of these is their manifest unfairness. Ineluctably they penalize other innocent individuals who bear no personal re-

4. O'Neil, *"Preferential Admissions: Equalizing Access to Legal Education,"* 2-3 Toledo Law Review 283 (1970).

5. "* * * the ultimate question we must confront is not whether preferential admissions is constitutional, but the antecedent question of whether it is prudent * * *." Summers, *"Preferential Admissions: An Unreal Solution to a Real Problem,"* 2-3 Toledo Law Review 377, 379 (1970).

sponsibility for historic wrongdoing. Moreover, while assuredly most people of color in this country are culturally "disadvantaged", not all are, nor are all whites by any stretch of the imagination properly to be considered "advantaged." Rarely if ever, for instance, have whites from poverty-stricken Appalachia been singled out as a group for preferential educational treatment. Nor has any favoritism been bestowed on members of other ethnic groups which credibly can claim to have been subjected to generalized societal discrimination—Italians, Poles, Jews, Greeks, Slavs—as a result of which at least some such persons bear the economic and cultural scars of prejudice and thus could be deemed entitled to preference as a form of restitution.[6]

In the crucial field of law, what the people in our urban ghettos need, we suggest, is the very best professional representation obtainable, regardless of the race, religion, sex or national origin of the lawyer. The law, obviously, is an exacting discipline, both intellectually and morally. The minority poor may be just as ill-served, or even cheated, by lawyers from their own communities as by middle class white lawyers. Nor is there any assurance that minority lawyers will return to their own communities to practice, considering other options which may be open to them.

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6. About two years ago, Herbert L. Maise, who is of Italian extraction, brought suit in U.S. District Court in Denver against the University of Colorado, claiming that he was discriminated against in that he was denied admission to the University of Colorado Law School. He demanded that the same special admission standards which were applicable to blacks, Mexican-Americans and American Indians be applied to his minority, which has also suffered discrimination. St. Paul Dispatch, May 10, 1972.

In any event, it is maintained, once admission to law school becomes predicated on any factors other than objectively estimated ability (however imperfect the state of that art may be), the door is open to political favoritism and standards of merit and achievement are bound to be eroded.[7] Moreover, the erosion may well tend to be progressive since, in the interest of demonstrating successful results, there is a strong temptation to grade disadvantaged minority students on a scale less rigorous than that by which others are measured. If this does happen (and some believe it already has), students will quickly perceive that they are beneficiaries of a double standard, which is apt to play havoc with their own self-esteem, not to mention the impact it may have on others who manage to graduate without any favoritism.[8] A significant adverse side effect of preferential treatment is likely to be that those minority students of high ability and accomplishment who excel strictly on merit, nevertheless upon graduation will carry the stigma that they, too, were beneficiaries of a double standard.

Bar examinations have proved to be a cruel impediment to a disproportionately high number of black students who succeeded in obtaining their law degrees. Why this is so is a painfully difficult question. In Michigan, for example,

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7. "It is difficult to accept that 'cultural deprivation' results not in deficiency in essential law school skills but merely in ability to demonstrate them and that they are likely to appear for the first time in law school." Graglia, *Special Admission of the "Culturally Deprived" to Law School,* 119 U. of Pa. L.Rev. 351, 358 (1970).

8. "Why does the sense of injustice call actively for equality? One explanation is that equal treatment of all within a recognized class is a necessary attribute of any legal order; the very concept of law requires this minimal regularity." Cahn, THE SENSE OF INJUSTICE, p. 15 (New York University Press, 1949).

in the summer of 1971, the results showed a passing rate of 71 percent for white candidates and 17 percent for blacks. Results in other states, regrettably, have been comparable. Because of the extraordinarily high mortality rate among black applicants throughout the nation, the National Bar Association in 1970 by unanimous vote of its delegates passed a resolution calling for the abolition of state bar examinations. The Association advocates that graduation from an accredited law school within a state should automatically entitle the graduate to practice law within that state. It honestly believes that deliberate racial discrimination on the part of bar examiners continues to play a major role in the disproportionately high rate of failure of black applicants.[9] Since numbers rather than names are customarily used on bar examination papers, this contention is difficult to accept. Although photographs are frequently requested of candidates (to thwart the possibility of "ringers"), there appears to be little evidence, if any, that bar examiners actually match these with examination papers during the grading process. Another hypothesis, which seems more plausible, is that sympathetic consideration in the grading of poorly prepared black students may be prevalent within law schools, but that no such consideration is feasible or, in fact, occurs in the grading of bar examination papers.[10]

9. For an exposition in support of this viewpoint, including black pass-fail ratios, see *Do Bar Examinations Serve a Useful Purpose?* American Bar Association Journal, December, 1971, p. 1215, by Edward F. Bell, judge of the Circuit Court of Wayne County, Michigan, and former president of the National Bar Association.

10. "One conservative professor at Cornell, who fought bitterly against double standards, confessed privately to me that he could not find it in his heart to give a failing grade to a hard-working

(*footnote continued on next page*)

In a feature column, "From Under My Afro," in the Cleveland Sun-Press, headlined "Preferential policy could backfire," James Nelson Coleman wrote on November 15, 1973, in part, as follows:

> There are black educators who ask not to be quoted but say that black students are failing to come up to standard in the nation's colleges where they have been accepted in significant numbers over more qualified white students.
>
> They say that the trouble is that the majority of good white colleges, under the tremendous social pressure created by the black nationalist movement, have substantially changed their admission policies to accommodate black students on a social and humanitarian basis, rather than a strictly academic one. And, in plain language, this has let in a high percentage of black students who are not qualified to do college level work beyond their Black Studies programs.
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> • • • My own research also makes me aware that a significant percentage of black students admitted to white colleges under preferential enrollment systems (which most white colleges deny they have) are failing to make the grade—especially in the medical schools.

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black girl in his class who clearly had not had the educational background to handle the material in his course • • • he was not prepared to hand out an F as readily to her as he did with white students. This is not an uncommon position." Sowell, BLACK EDUCATION—MYTH AND TRAGEDY, p. 132 (David McKay, 1972).

"A group of black students chained themselves to posts in the Wayne State University Law School this fall demanding the readmittance of fourteen blacks who had flunked out after their first year of law studies. Their demands were met; all fourteen were readmitted. Most of the blacks in question had been taken in under special standards." Salsinger, *A Change of Heart*, Change, November-December, 1970, p. 23.

The problem deserves some thought.[11]

Also germane to the issue of racially preferential admission to professional schools, and of artificially imposed proportional representation therein on the basis of race, are the following excerpts from the widely syndicated column by Roy Wilkins, the distinguished Executive Director of the National Association for the Advancement of Colored People, in the New York Post of March 3, 1973:

> • • • It is ridiculous for Negroes to claim that because they are 40 percent of the population, they should have 40 per cent of the jobs, 40 per cent of the elected offices, etc.
>
> This is self-defeating nonsense, for no person of ability wants to be limited in his horizons by an arbitrary quota or wants to endure unqualified people in positions that they fill only because of a numerical racial quota.

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11. See, e.g., "The American Foundation for Negro Affairs has launched a program to prepare more Negroes to pass the highly competitive tests for admission to schools of medicine, dentistry and other health sciences. Previous attempts by some black groups, which simply demanded that medical schools admit more black students, foundered when many of those admitted flunked out." Fleischman, Let's Be Human (National Labor Service, American Jewish Committee) August-September, 1971.

In a news release from the A. Philip Randolph Institute on November 29, 1973, "In Memory of Arthur Logan," the Institute's Executive Director, Bayard Rustin, observed:

> "He (Dr. Logan) worked tirelessly to root out discrimination from the medical profession. And he was forever encouraging young blacks to take up medicine as a profession, because he believed firmly in its worth. But he believed that black doctors should undergo the same discipline and meet the same standards as others. He was adamantly opposed to the lowering of standards; he understood too well that this would irreparably damage not only the medical profession but also the black community itself."

> • • • Ignoring the decades in which black college students were on a 'zero quota' basis, they went into college admissions policies which on some campuses set aside a percentage of places for black applicants. In some places white applicants with excellent records have been made to stand aside for blacks with inferior records.
>
> • • • Such practices and, in fact, the whole black-tilted system are doing no favors to Negro applicants. God knows it is true that the cards have been deliberately stacked against blacks. Every feasible step, even those costing extra money, should be taken to correct this racialism.
>
> But there must not be a lowering of standards. Negroes need to insist on being among the best, not on being the best of the second-or third-raters • • •.

In his book BLACK EDUCATION, MYTHS AND TRAGEDIES, *supra*, Thomas Sowell, who attended public school in Harlem and is now Associate Professor of Economics at the University of California at Los Angeles, forcefully articulated his own aversion to quotas as a remedy for past deprivation:

> • • • the actual harm done by quotas is far greater than having a few incompetent people here and there —and the harm that will actually be done will be harm primarily to the *black* population. What all the arguments and campaigns for quotas are really saying, loud and clear, is that *black people just don't have it*, and that they will have to be *given* something in order to have something. The devastating impact of this message on black people—particularly black young people —will outweigh any few extra jobs that may result from this strategy. Those black people who are already competent, and who could be instrumental in producing

> more competence among the rising generation, will be completely undermined, as black becomes synonymous —in the minds of black and white alike—with incompetence, and black achievement becomes synonymous with charity or payoffs. (at 292)

In sum, while historically it is understandable, what is wrong with racially based preferential admission to professional schools in social policy terms is that, in the long run, it is counterproductive and doomed to fail. By impairing the principles of individual merit and achievement, it is likely to be more damaging than helpful to the very people it is intended to benefit, not to mention its effect on the society at large.

III

To rectify the consequences of past discrimination, sound social policy mandates affirmative action programs for professional school admission which can pass constitutional muster and which do not discriminate in reverse.

Experience has demonstrated beyond cavil that the legal requirements of non-discrimination and of equal educational opportunity for all, which in historical terms are of comparatively recent vintage, are by themselves inadequate to erase the cumulative effects of the pervasive and deeply rooted discriminatory practices which heretofore have burdened people of color in America. Those of our citizens who have suffered special educational hindrance on the basis of race clearly are entitled to special educational help on the same basis to enable them to compete successfully. The key problem for our society, of course,

is to accomplish this result equitably, i.e. without undercutting the principle of equal educational opportunity for others. All of our young people, in particular, must be encouraged to actualize their educational potentialities to the maximum extent possible, irrespective of race, religion, sex or national origin. In historical terms, it may be said that the burgeoning of our public education system, from the elementary grades through professional school, in a sense has been a vast affirmative action program to provide opportunities for all. It has not been enough, however.

Programs designed to augment the numbers of disadvantaged minority individuals attending professional schools should not await the professional school threshold. The initiatives must begin much earlier. Specifically, we believe that vigorous efforts should be made even at the junior high school level to identify promising disadvantaged students, especially in poor neighborhoods and in schools with large minority group enrollments, so as to provide at this early stage the necessary guidance for them to plan for professional careers.[12] On the senior high school level there is need for additional federally funded remedial programs, such as Upward Bound and College Discovery, to stimulate and to assist students who appear to have the capabilities for professional careers but who, because of

12. "The predominantly Black National Medical Association has started a nationwide recruitment campaign for more Black medical students. 'We're not only trying to define and seek out the bright, young medical student,' explained NMA board member Dr. Ross Miller, 'but we also want to do whatever is necessary to see that that student is successful in *finishing* his medical courses and becoming a good physician.' NMA members will help young Black students as early as the ninth grade plan the curricula that offers them a solid background in the sciences." Fleischman, Let's Be Human, *supra*, December 1973-January 1974.

limiting economic and cultural circumstances, may have no such aspirations or prospects.

No promising student should be excluded from college because of lack of funds. Hence there is need also to expand public college open enrollment programs for high school graduates, such as presently are in operation in the City University of New York, coupled with financial aid and part-time job opportunities, to facilitate attendance by disadvantaged students. While we strongly favor special remedial education programs to enable those who need such assistance to meet the existing requirements for graduation from college, we believe that graduation requirements ultimately must be the same for all students.

The problem of standards inevitably is a difficult and complex one. Every effort should be made to achieve performance validation of all examinations and criteria for admission to institutions of higher learning. Genuinely objective and bias-free selection standards urgently need to be implemented wherever they may be absent. But separate standards exclusively for certain minority group applicants, of course, should be rejected. However, once students are admitted to professional school, all those who encounter difficulty (as many do) should receive as much help as they may require to enable them to qualify for graduation.

What can be done to produce results in expanding minority professional school enrollment through legitimate affirmative action programs has been graphically demonstrated by the success of the Council on Legal Education Opportunity (CLEO) summer institutes. Established in

1968 jointly by the American Bar Association, National Bar Association, American Association of Law Schools and Law School Admission Council, and funded by both public sources and private foundations, CLEO has surpassed by more than a hundred its initial goal of bringing 300 minority group lawyers into the profession by 1973.[13] Were it not for CLEO, many if not most of these lawyers probably would not be in practice today.

To the extent that this pre-admission remediation and orientation program serves to reinforce the capabilities of disadvantaged minority law school candidates so as to enable them to compete successfully with other candidates for admission and during their course of study, on its face it would appear to be free of either constitutional or social policy infirmities. The *caveat,* of course, must be that law schools evaluate CLEO graduates no differently from other applicants, namely, on the basis of their estimated total qualifications and without regard to race.

The central purpose of CLEO, as stated in its by-laws is "to expand and enhance the opportunities to study and practice law for members of minority and disadvantaged groups—chiefly Negroes, American Indians and Spanish-speaking Americans, and thus to help to remedy the present imbalance of [these] and other disadvantaged groups in the legal profession in the United States." CLEO also provides financial stipends to needy students. Although most CLEO students assuredly derive from the groups named therein, not all do, and persons from other disadvantaged backgrounds are not excluded. As was noted recently by CLEO's Executive Director, Prof. Michael J. Moorhead, a number of Appalachian whites have participated in the program.[14]

13. 18 American Bar News, No. 10, October 1973.

14. *Ibid.*

In view of the fact that last year nearly ten applicants competed for each opening in the seven CLEO institutes conducted during the summer of 1973, it seems evident that there is an unmet need for additional programs. Moreover, the attrition rate among CLEO students, once they enter law school, has been reported to be very little worse than that of other law students.[15] In sum, it is this type of affirmative action program for professional school admission which appears to have been successful and thus deserves to be replicated extensively.

Further, law schools themselves, including the University of Washington Law School, should establish special one-semester remedial programs for disadvantaged applicants of all races. Programs of this nature could accommodate a good many of the unaccepted CLEO applicants who are now being turned down for lack of space. Upon successful completion of such a program, students would be enrolled in the law school.

To complement the increasing numbers of minority students who are enrolling in professional schools, it is vital to augment the ranks of minority professors in such schools. Special recruitment efforts are needed to bring into the teaching cadres qualified minority doctors, dentists, lawyers and other practicing professionals, as role models of success for minority students.

Having said all this, it must be acknowledged with sadness that these recommended legitimate affirmative action approaches, while assuredly they can improve matters considerably, provide no magical, instant solution to the problem of insufficient qualified minority group profes-

15. *Ibid.*

sionals. However, neither do any other approaches provide such a solution. With all of the good will in the world, it is simply not possible to bestow instant capabilities on anybody. In the final analysis, individual merit, measured as accurately and objectively as humanly possible, must be the crucial determinant in educational as well as in employment opportunity, rather than artificially imposed proportional representation based on racial or ethnic extraction. As we have already learned through painful experience, a double-standard society will not work for very long.

Conclusion

For the reasons set forth herein, the decision of the court below should be reversed.

Respectfully submitted,

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